NO. 414

IN THE

Supreme Court of the United States

THOMAS ROGER LICHTEN, ET AL.

v.

STATE OF TEXAS

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

APPELLANTS' MOTION FOR REHEARING OF DISMISSAL OF APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

CHRIS DIXIE
ROBERT E. HALL
GEORGE C. DIXIE
505 Scanlan Building
Houston, Texas 77002
713/223-4444
Attorneys for Appellants

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

NO. 414

IN THE

Supreme Court of the United States

THOMAS ROGER LICHTEN, ET AL.

v.

STATE OF TEXAS

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

APPELLANTS' MOTION FOR REHEARING OF DISMISSAL OF APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

PETITION FOR REHEARING

Under Rule 58, all Appellants petition for rehearing of the dismissal of this appeal on October 28, 1968 for want of a substantial federal question, from which order Mr. Justice Harlan dissented.

On November 18, 1968, this Court noted probable jurisdiction in No. 492, *Brandenberg v. Ohio,* in which the Ohio criminal syndicalism statute is challenged on First Amendment grounds. This intervening event justifies, indeed compels, this request for rehearing because of the similarity of the two statutes.

The Ohio statute in No. 492 is:

Ohio Revised Code 2923.13. *Advocating criminal syndicalism.*

> No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; . . . or voluntarily assemble with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

The Ohio appellant was convicted in one count for advocating the necessity or propriety of crime, violence or unlawful methods of terrorism as a means of accomplishing political reform, and, in a second count for voluntarily assembling "with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism."

The Texas statute in this case is Article 439 of the Texas Penal Code, entitled *Unlawful Assembly.*

> "Unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

Article 449 of the Texas Penal Code enhances the punishment if the purposes of unlawful assembly be to prevent any person from pursuing his occupation or avocation or to interfere in any manner with another's labor.

Both statutes are fatally broad. The Texas statute is worse than the Ohio statute because the latter is limited to the advocacy of crime, sabotage, violence or unlaw-

ful methods of terrorism while the Texas statute reaches assembly with an intent by any means, whether violent or not, to accomplish certain objectives, whether criminal or not, and whether otherwise illegal or not.

The different disposition of the two cases appears to us to concern primarily the facts. In the Texas case, Appellants trespassed on the private property of another and "sat in" while in the Ohio case the meeting took place on private property and involved no actual trespassing or crime.

"Standing" considerations produce some slippery distinctions. From these two cases, we deduce that standing to invoke the First Amendment against a statute exists in persons who gather to express threats of violence in opposition to clear public policy and indeed contrive to transmit their violent disaffection by television, while the Texas group lacks standing to invoke the First Amendment where their ultimate aim is to promote cherished national policy but their intent includes trespass.

However, the Texas group was not convicted of trespass. Trespass is not a crime in Texas and the State has never claimed that it is. Nor was the Texas group convicted of sitting in the restaurant, or refusing to leave when requested to do so, or for blocking the seats while sitting in them.

The Texas group was convicted of a meeting of three or more persons with an intent to interfere with a cafe owner in the operation of his business or to disturb him in the enjoyment thereof.

So, this case is not *Adderley v. Florida,* 285 U.S. 39, in which the Florida general trespass statute was applied. Since Texas does not make trespass a crime and since it is not charged that the Texas group met with the intent

to commit any crime, this case cannot rightly be pigeonholed as a simple trespass or conspiracy prosecution. The State of Texas has assured this Court as much at page 9 of its successful Motion to Dismiss where it says:

> "The evil which is attacked by the statute is '. . . to aid each other . . . to deprive any person of any right or to disturb him in the enjoyment thereof.' "

Loss of standing here, then, evidently rests upon the notion that anyone knows, or should know, that it amounts at least to a civil wrong to trespass or to remain in a restaurant after being directed to leave with an object of disturbing the proprietor in the enjoyment of his rights. And, further, since this much common sense is rightly chargeable to any citizen, those who meet (in groups of 3 or more) with such an intent do not have standing to interpose the First Amendment against the statute unless their subsequent conduct is also constitutionally protected. It is submitted this goes too far where the challenged statute reaches beyond force or violence, beyond defined criminal conduct, and into the ambiguous area of civil wrongs. This the Texas statute does.

The menacing overhang of a statute like this is not really different from the prior restraint you condemned in No. 6, this term, *Carroll v. Princess Ann,* decided November 19, 1968. "An order issued in the area of First Amendment rights must be couched in the narrowest terms . . ." Ibid, slip opinion, p. 6. Just so, a statute in the First Amendment area must be "precisely drawn." The rights in question are too precious to be ignored by considerations of standing. The court order struck down in *Carroll* pertained to ugly conduct indeed, but this court refused to decide if an injunction could be justified on

the facts of the case. Ibid, p. 6. For the same reasons, an overbroad statute which becomes, in effect, a prior restraint or chilling agent or First Amendment conduct should not be allowed to stand because a conviction could be justified on the facts of the case under a properly drawn statute.

It is clear that the Texas and Ohio statutes are similar in that they both prohibit the assemblage of persons formed to teach or advocate (or intend) the use of unlawful methods of crime, force or violence. The Texas statute goes further to reach all methods, even peaceful. The Ohio statute relates to the objective of political or industrial reform. The Texas statute relates to the disturbance of private rights.

No limiting construction of the Texas courts trims the reach of the Texas statute, the State's Motion to Dismiss notwithstanding. The statute applies to an intent by any means to disturb any right. A careful reading of the Texas decisions cited by both parties here will confirm this point.

The record in this case shows an exclusion of evidence offered by Appellants to show retaliation visited upon Negroes who attempted to obtain service in this restaurant, a public accommodation. As this record also shows, these defendants originally removed this case to federal court in reliance upon *Rachel v. Georgia;* 342 F.2d 336 (CA 5, 1965), alleging in their removal petition that the instant prosecutions were maintained in support of a policy of racial segregation maintained by Huntsville City and Walker County, Texas. (*Rachel* was a trespass case.)

On June 20, 1966, this Court decided *Georgia v. Rachel,* 384 U.S. 780, and *City of Greenwood v. Peacock,* 384 U.S. 808. As directed in *Peacock,* Appellants con-

sented to remand to state court and took up their federal defenses there, hopefully reading of the many ways that federal claims could be urged, including the right of appeal to this Court, 384 U.S. 828-831, as *Peacock* reminded.

Now, the "standing" problem has evidently intruded. By orthodox First Amendment doctrine, Appellants have a claim against an overbroad statute specifically regulating peaceful assembly. By *Adderley* and other standards, we should not be able to raise First Amendment claims which belong only to others. *England v. Louisiana St. Bd. of Med. Exam.*, 375 U.S. 411, cited in *Greenwood*, 384 U.S. p. 829, articulates the confusion in litigation which results.

The Texas statute expressly regulates First Amendment peaceful assemblage. Cf. *U. S. v. Petrillo*, 332 U.S. 1, 9-10. It, therefore, merits appropriate careful scrutiny as to its potential effect on associational activity. These Appellants are not guilty of such "hard core" conduct as to disqualify them from challenge of a statute as overbroad as this where their conduct was not criminal in any respect except their gathering in a group of three or more.

Respectfully submitted,

CHRIS DIXIE
ROBERT E. HALL
GEORGE C. DIXIE
505 Scanlan Building
Houston, Texas 77002
713/223-4444
Attorneys for Appellants

By_____
CHRIS DIXIE

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Attorney for Appellants

November 21, 1968